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IN THE
COURT OF APPEALS OF INDIANA

ADAM ROGERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0702-CR-147
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0510-MR-183696

October 18, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Adam Michael Rogers (Rogers), appeals his sentence for murder, a felony, Ind. Code § 35-42-1-1(b).

We affirm.

ISSUE

Rogers raises one issue, which we consider on appeal: Whether the trial court properly sentenced him.

FACTS AND PROCEDURAL HISTORY

On October 22, 2005, Rogers entered a Tobacco Road gas station in Indianapolis, Indiana with a gun. Rogers pointed the gun at Palwider Singh (Singh), the store clerk. Singh reached toward the gun apparently attempting to move it and Rogers shot Singh in the chest. Rogers fled the store without taking any money or items. Singh died moments later from the gunshot wound.

Police officers reviewed the store's surveillance tape and identified Rogers as the shooter. Rogers turned himself in and explained to homicide officers in a taped statement that he pointed the gun at the clerk, demanded money and "the gun went off." (Transcript p. 8).

On October 28, 2005, the State filed an Information charging Rogers with: Count I, murder, a felony, I.C. 35-42-1-1; Count II, murder, a felony, I.C. § 35-42-1-1; Count III, attempted robbery, as a Class A felony, I.C. §§ 35-42-5-1, 35-41-5-1; and Count IV, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1. On December 13, 2006, Rogers entered into a plea agreement with the State where he agreed

to plead guilty to felony murder if the State dropped the remaining charges. The terms of the plea agreement left the sentence to the trial court's discretion.

On December 13, 2006, the trial court accepted Roger's guilty plea. On January 16, 2007, the trial court held a sentencing hearing. The trial court found:

> It's a very strange way that you've gotten your life twisted around because I read all the letters from all your friends and your church and your mentor and was very impressed by your youth and what you've done with yourself but what went wrong other than cocaine and why you couldn't do something about that is going to remain a mystery. Mitigating circumstances indicate that you had no criminal history except for the fact that you were on a misdemeanor conviction. Mitigating circumstances can be taken into [consideration] because you pled guilty as opposed to making the State go through the trial and I think mitigating circumstances in the fact that you have expressed remorse and you did in fact turn yourself in, however, at the same time some of the things that [defense counsel] points out that he considered as mitigating could in fact be considered aggravating. You were in a self induced use of cocaine. There was no one who was making you take cocaine and your need to go out and continue to get it is what ended up in this end result and for that reason I would consider that aggravating. You were on probation at the time that you committed this offense - - unfortunately for drug usage and possession of marijuana. Secondly, you did enter the premises with a loaded gun and a gun that was in fact cocked and because you planned in advance by going to get this gun all of those things would be considered as aggravating circumstances.

(Tr. pp. 47-48).[1] The trial court then found that aggravating circumstances outweighed mitigating circumstances and sentenced Rogers to sixty years in the Department of Correction.

Rogers now appeals. Additional facts will be provided as necessary.

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[1] In reviewing the record, we do not find any of the letters submitted by Rogers' friends, church, or mentor mentioned by the trial court during the sentencing hearing. Nevertheless, because of the trial court's statement during sentencing, we assume for purposes of this review that they speak favorably of Rogers' character during his youth.

DISCUSSION AND DECISION

Rogers argues that the trial court improperly sentenced him. Specifically, Rogers argues that (1) the trial court improperly balanced the aggravating and mitigating factors and (2) his sentence of sixty years is inappropriate in light of the nature of the offense and his character.

Our supreme court recently clarified a defendant's right to appellate review of a trial court's sentencing decision by stating, "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion occurs if we find the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7,13 (Ind. Ct. App. 2006). The trial court no longer has any obligation to weigh aggravating and mitigating factors, and therefore cannot be said to have abused its discretion in failing to properly weigh those factors. I.C. § 35-38-1-7.1(d); *see also Anglemyer*, 868 N.E.2d at 491. Thus, we will not address whether the trial court properly balanced the aggravating and mitigating factors.

We also have the authority to review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer*, 868 N.E.2d at 491. Our supreme court has encouraged us to critically investigate sentencing decisions. *See, e.g. Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001). The purpose of the express authority to review and revise sentences is to ensure that justice is done in

Indiana courts and to provide unity and coherence in judicial application of the laws. *Pruitt v. State*, 834 N.E.2d 90, 121 (Ind. 2005).

Appellate Rule 7(B) was revised in 2003, to provide opportunity for us to revise sentences when we find them "inappropriate" rather than "manifestly unreasonable," which was the previously required finding. *See Hope v. State*, 834 N.E.2d 713, 720 (Ind. Ct. App. 2005). The new language of the rule changed the thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. *Id*. As we explained earlier this year, "by our count [our supreme court] has now decided a total of twenty-two cases under the "inappropriate" standard in place since January 2003 and revised the sentence in eleven of those cases." *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

We first note the charge to which Rogers pled guilty was murder, a felony, I.C. § 35-42-1-1(b), which is often referred to as felony murder. Felony murder requires an imprisonment for a fixed term between forty-five and sixty-five years with the advisory sentence being fifty-five years. I.C. § 35-50-2-3. By sentencing Rogers to sixty years, the trial court has imposed a sentence which exceeds the advisory sentence by five years.

Upon reviewing the record to determine the nature of the offense, we find that, as with any murder, the crime was revolting. While robbing a gas station to get money for drugs, Rogers shot Singh in the chest while standing approximately three feet away. However, Rogers' statements to the police and the trial court, along with the video footage from the store, support a finding that his shooting may have been a reaction to Singh's justified thrust toward Rogers' weapon. This is further supported by the fact that

Rogers fled the store immediately after firing one shot without taking anything, although he had entered intending to steal money. Nevertheless, Rogers has pled guilty to felony murder and openly admits that he intended to rob the store, which is the required intent for the crime of felony murder. Looking at the nature of the offense aspect alone, we find that the fact Rogers was attempting to steal in order to buy drugs supports the imposition of a sentence in excess of the advisory.

As to Rogers' character, we first observe that Rogers has a criminal history consisting of one conviction for possession of marijuana, subsequent probation violations including two urinalyses which tested positive for marijuana, and an arrest for possession of cocaine that resulted in charges being brought, but subsequently dropped. He does not have any history of violent behavior. Typically, minor non-violent criminal history, such as Rogers', cannot be considered significant in the context of a sentence for murder. *See Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999).

Rogers asks that we consider his criminal history as evidence of a drug problem and find that his problem supports a reduction of his sentence because it detracted from his level of culpability when committing the murder. The State argues to the contrary, citing *Bryant v. State,* 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), that courts are more inclined to consider drug addiction as an aggravating factor when a defendant does not take positive steps to treat the addiction.

Noting that Rogers completed a drug treatment program just months prior to the crime at issue, we do not agree with the State that his drug addiction necessarily supports and enhancement of his sentence. Neither do we agree with Rogers that his addiction can

be used as an excuse to reduce his sentence. Rogers had been given an opportunity to address his addiction in a drug treatment program, and obviously failed. Moreover, an argument of intoxication can be used to dispute a defendant's ability to form specific intent, but is not to be considered a mitigating circumstance. *See Hornbostel v. State*, 757 N.E.2d 170, 184 (Ind. Ct. App. 2001).

The facts that Rogers turned himself in within days after the crime, gave a statement to homicide officers confessing his crime, pled guilty to the murder for which he was charged, and openly accepted responsibility for the crime although he believes that his firing of the weapon was unintentional could be telling of Rogers character. As we have frequently explained, a defendant who pleads guilty extends a benefit to the State and deserves to have mitigating weight extended to him at sentencing.[2] *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006); *Williams v. State,* 840 N.E.2d 433, 438 (Ind. Ct. App. 2006); *Scott v. State*, 840 N.E.2d 376, 382-383 (Ind. Ct. App. 2006), *trans. denied*. Less frequently have courts had the opportunity to explain that defendants who quickly turn themselves in and confess their crime are due substantial mitigating weight. *See e.g. Evans v. State*, 598 N.E.2d 516, 518 (Ind. 1992). However, the record does not display whether Rogers' actions of turning himself in, confessing, and pleading guilty were solely a product of his good character, or more a product of the fact that the

[2] In passing we note, due to the facts that Rogers' charge for attempted robbery must be merged into his conviction for felony murder and the other Count of murder which he faced is barred by principles of double jeopardy, the only Count which the State dropped that extended benefit to Rogers was the misdemeanor Count—carrying a handgun without a license. We find this to be a minimal benefit for his plea in this case.

murder was video recorded. Thus, we cannot conclude that these facts compel us to reduce Rogers' sentence.

In summary, the nature of the offense in this situation supports an imposition of a sentence in excess of the advisory sentence, and Rogers' character as displayed by the record does not oblige us to reduce his sentence. Thus, we conclude that the sentence imposed by the trial court was not inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the sentence imposed by the trial court was not inappropriate when considering the nature of the offense and Rogers' character.

Affirmed.

SHARPNACK, J., concurs.

FRIEDLANDER, J., concurs in result with opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

FRIEDLANDER, Judge, **concurring in result**

I agree with the majority that the sentence imposed by the trial court was not inappropriate, and therefore concur in affirming the sentence. In so doing, however, I cannot subscribe to the majority's conclusion with respect to the import of Rogers's criminal history of drug addiction in the analysis of whether the sentence is appropriate. The majority concludes that Rogers's drug addition "does not necessarily support[]" the imposition of a sentence in excess of the advisory sentence. I disagree.

Our Supreme Court has observed that the significance of even seemingly minor prior offenses can vary based in part upon the way in which they relate to the current offense. *See Ruiz v. State*, 818 N.E.2d 927 (Ind. 2004). In this case, Rogers admitted that

he committed the instant offense as a direct result of his substance abuse. As such, his criminal history certainly "bears [a] relation to the crime for which the [increase above the presumptive][3] sentence was applied." *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006). In my view, this makes the prior marijuana conviction and multiple probation violations involving illegal drug use both significant and relevant. This is especially so in light of the fact that Rogers has seemingly abandoned attempts at overcoming his drug addiction. In the final analysis, my view differs from that of the majority with respect to what Rogers's history of illegal drug use reveals about his character.

[3] I believe that we should no longer use the term "enhancement" when referring to the length of a criminal sentence. Although I understand this to mean the sentence imposed exceeded the advisory sentence, I believe the term "enhanced" is a vestige of the former sentencing scheme, which included a "presumptive" sentence that was viewed as a mandatory baseline from which the sentencing court could add or subtract years, but only with explicitly stated justification. *See* Ind. Code Ann. §§ 35-50-2-4 through –7 (amended 2005). The concept of a "presumptive" sentence was abolished in the new scheme and replaced by a sentencing range that includes an advisory sentence. Under the new scheme, there is no longer a prescribed sentence from which deviations must be justified. Our Supreme Court has referred to the advisory sentence as merely "the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007). Perhaps it is now more accurate to refer to a sentence exceeding the advisory sentence as just that – a sentence in excess of the advisory sentence, not an "enhanced" sentence.